No. 80-608

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES POSTAL SERVICE, APPELLANT

v.

COUNCIL OF GREENBURGH CIVIC ASSOCIATIONS AND SAW MILL VALLEY CIVIC ASSOCIATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

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QUESTION PRESENTED

Whether 18 U.S.C. 1725, which prohibits the deposit of unstamped "mailable matter" in letter boxes used by the Postal Service for the delivery of mail, unconstitutionally abridges the First Amendment right of appellee civic associations to freedom of expression.

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OPINIONS BELOW

The opinion of the district court on remand (J.S. App. 1a-12a) is reported at 490 F. Supp. 157. The opinion of the court of appeals remanding the case to the district court (J.S. App. 13a-19a) is reported at 586 F.2d 935. The original opinion of the district court (J.S. App. 23a-31a) is reported at 448 F. Supp. 159.

JURISDICTION

The judgment of the district court (J.S. App. 20a-21a) was entered on May 20, 1980. A notice of ap-

peal to this Court (J.S. App. 22a) was filed on June 18, 1980. On August 6, 1980, Mr. Justice Marshall extended the time for docketing the appeal to and including October 16, 1980. The appeal was docketed on October 14, 1980.[1] This Court noted probable jurisdiction on January 12, 1981. The jurisdiction of this Court rests on 28 U.S.C. 1252. *United States* v. *Darusmont*, No. 80-243 (Jan. 12, 1981), slip op. 1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

18 U.S.C. 1725 provides:

> Whoever knowingly and willfully deposits any mailable matter such as statements of accounts, circulars, sale bills, or other like matter, on which no postage has been paid, in any letter box established, approved, or accepted by the Postal Service for the receipt or delivery of mail matter on any mail route with intent to avoid payment of lawful postage thereon, shall for each such offense be fined not more than $300.

STATEMENT

1. This case involves the question whether 18 U.S.C. 1725, which prohibits the placement of "mailable matter" in a letter box without the payment of

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[1] Under Rule 12.4 of the Rules of this Court, appellees docketed a cross-appeal on November 18, 1980 (No. 80-815). The Court has not acted on the cross-appeal.

postage, may constitutionally be applied to appellee civic organizations.[2] The statute was enacted in 1934 "to curb the practice of depositing statements of

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[2] Under 39 U.S.C. 401, the United States Postal Service is broadly empowered to adopt rules and regulations designed to accomplish the objectives of the Postal Reorganization Act of 1970. Many of the Postal Service's current regulations are contained in the Domestic Mail Manual (DMM), which has been incorporated by reference into the Code of Federal Regulations. 39 C.F.R. Part 111. The DMM requires both urban and rural customers to provide appropriate mail receptacles. DMM 155.41, 156.311, 156.54. Although the DMM contains detailed specifications for the permissible size, shape, and dimensions of letter boxes and mail slots (see DMM 155.43, 156.51), the Manual provides generally that "[e]very letter-box or other receptacle intended or used for the receipt or delivery of mail on any city delivery route, rural delivery route, highway contract route, or other mail route is designated an authorized depository for mail within the meaning of 18 U.S.C. * * * 1725." DMM 151.1. Accordingly, in the Postal Service's view, if a particular receptacle is actually used for the receipt or delivery of mail, it is a "letter box established, approved, or accepted by the Postal Service" within the meaning of Section 1725, even if it does not comply with one or more provisions in the DMM governing the characteristics of letter boxes. (The prohibition contained in 18 U.S.C. 1725 is repeated in the Postal Service's regulations at DMM 146.21.) The DMM explicitly states that the post on which a mail receptacle rests "is not part of the receptacle" and therefore is not considered part of the "letter box" for purposes of Section 1725. DMM 151.1. Since September 1980, the DMM has specified that "door slots, and nonlockable bins or troughs used in connection with apartment house mailboxes are not letter boxes within the meaning of 18 U.S.C. 1725 * * *." 45 Fed. Reg. 56057 (1980). This regulation appears to be consistent with the Postal Service's past practice in connection with the enforcement of Section 1725. In any event, neither door slots nor apartment house mailboxes are involved in this case.

account, circulars, sale bills, etc., in letter boxes established and approved by the Postmaster General for the receipt or delivery of mail matter without payment of postage thereon, by making this a criminal offense." H.R. Rep. No. 709, 73d Cong., 2d Sess. 1 (1934).[3]

2. Appellee Council of Greenburgh Civic Associations is an umbrella organization for a number of civic groups in Westchester County, New York.[4] Appellee Saw Mill Valley Civic Association is one of the Council's member groups. In June 1976, the Postmaster in White Plains, New York, notified the Chairman of the Saw Mill Valley Civic Association that the practice of delivering messages to local residents by placing unstamped notices and pamphlets in the letter boxes of private homes is illegal and that postage can be charged for each item distributed in

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[3] The Senate and House Committees on Post Offices and Post Roads explained the principal motivation for the statute in the following terms:

> Business concerns, particularly utility companies, have within the last few years adopted the practice of having their circulars, statements of account, etc., delivered by private messenger, and have used as receptacles the letter boxes erected for the purpose of holding mail matter and approved by the Post Office Department for such purpose. This practice is depriving the Post Office Department of considerable revenue on matter which would otherwise go through the mails, and at the same time is resulting in the stuffing of letter boxes with extraneous matter.

H.R. Rep. No. 709, 73d Cong., 2d Sess. 1 (1934); S. Rep. No. 742, 73d Cong., 2d Sess. 1 (1934).

[4] The Town of Greenburgh is the political subdivision of Westchester County in which the appellee civic groups are located.

that manner (A. 24). Several members of appellee Council, including the Saw Mill Valley Civic Association and the Hilltop Farms Civic Association, apparently had violated 18 U.S.C. 1725 by depositing materials concerning civic association affairs in local letter boxes without paying the required postage. In response to an inquiry from appellees' counsel, the Postal Service confirmed that the practice of the civic associations was unlawful and, if continued, could result in a fine not exceeding $300 (A. 25-28).

Several months later, in February 1977, appellees filed this suit in the United States District Court for the Southern District of New York. They contended that enforcement of 18 U.S.C. 1725 would inhibit their communication with residents of the Town of Greenburgh and would thereby deny them the freedom of speech and freedom of the press guaranteed by the First Amendment (A. 3-17).

The district court dismissed the complaint for failure to state a claim on which relief could be granted (J.S. App. 23a-31a).[5] Relying on *Grayned*

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[5] The district court rejected appellees' contention that 18 U.S.C. 1725 does not apply to noncommercial matter (J.S. App. 25a-28a). In the court's view, two pieces of evidence in the statute's legislative history demonstrate that Congress intended the law to cover civic notices and political pamphlets as well as advertisements, statements of account, and other commercial items. The court first pointed (J.S. App. 26a-27a) to a colloquy on the floor of the House of Representatives in 1932, during debate on H.R. 9262, the nearly identical predecessor of the bill enacted two years later. Representative Mead, the Chairman of the House Post Office Committee, rejected a proposed floor amendment that would have added the word "commercial" to the bill in order to permit the deposit of community notices in letter boxes without payment of postage. The district court also cited a 1934 press release

v. *City of Rockford*, 408 U.S. 104, 116-117 (1972), the court ruled that Section 1725 "imposes only a minimal burden on [appellees'] activities" and that the statute is narrowly tailored to further legitimate and significant governmental interests (J.S. App. 30a). The court observed that appellees "are free to leave community messages on doorknobs, behind screen doors, and in similar locations" (*ibid.*). In the court's view, "[t]he existence of this alternative seriously undermines [appellees'] claim that enforcement of the statute effectively prohibits their activity by imposing postage costs that volunteer community organizations cannot afford" (*ibid.*). In any event, the court concluded (*ibid.*),

> the Constitution does not guarantee plaintiffs an absolute right to the most efficient or effective means of communication.

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in which the Postmaster General announced an amendment in postal regulations that prefigured the statute enacted a few months later. In that press release, the Postmaster General observed (App., *infra*, 2a) (emphasis added):

> Patrons of the Postal Service throughout the country have deluged the Department with complaints that their private letter boxes have been cluttered with all kinds of advertising matter, circulars, statements, bills, *political handouts*, tickets of all kinds, bargain sale announcements, etc.
>
> In many instances letter carriers have found it difficult to deposit mail in the overcrowded letter boxes, and in the larger cities this has worked considerable hardship on the carrier with a resultant lost of time.

The district court concluded (J.S. App. 28a): "These contemporaneous records indicate that, although non-commercial matter was not the primary focus of Post Office Department or Congressional concern at the time the statute was enacted, it was intended to be within the scope of the statutory prohibition."

The court of appeals reversed, holding that the case should not have been dismissed before trial because "enough is alleged in the complaint to raise the issue of infringement of freedom of communication" (J.S. App. 14a). The court of appeals remanded the case to the district court to give the parties "an opportunity to submit proof as to the extent of the handicap to communication caused by enforcement of the statute in the area involved, on the one hand, and the need for the restriction for protection of the mails, on the other" (*ibid.*; footnotes omitted).

On remand, the Postal Service demonstrated that Section 1725 protects mail revenues, facilitates efficient and secure delivery of the mails, and promotes the privacy of mail patrons. Although Congress' primary purpose in enacting Section 1725 was the protection of mail revenues, the statute also plays a role in the investigation of mail theft. By restricting legitimate access to letter boxes, the statute allows investigators and other observers to assume that anyone other than the postal carrier or the householder who opens a mailbox may be engaged in a violation of the law (A. 66-70).[6]

The Postal Service also introduced evidence describing the additional burden on postal resources that would be imposed by an injunction against the enforcement of Section 1725 as applied to civic or political organizations. If the statute may be applied to commercial materials alone, mail carriers will be obliged to remove and examine individual unstamped items found in letter boxes to determine if their deposit there is lawful (A. 143-145). Carriers

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[6] In particular, Section 1725 has proven helpful in the investigation of thefts of government benefit checks from letter boxes in economically depressed areas (A. 159-161).

will also be confronted with a larger total amount of unstamped mailable matter in letter boxes, which they will be obliged to separate from outgoing mail placed in the boxes by postal patrons for collection. A cost analysis showed that, if this extra duty is required on a nationwide basis, it will add substantially to the expenses incurred in daily delivery of the mail (*ibid.*).

The Postal Service's evidence further showed that appellees have ample alternative methods of delivering their messages, such as by placing notices or pamphlets under a door or doormat or on a doorknob. A survey of the comparative effectiveness of different distribution methods produced the following results (A. 165):

Method Used	% of Distribution Found That Were Read	% of Total Distribution Read
Under Door or Mat	83%	59%
On Door Knob	81%	61%
In Mail Box	86%	71%

Appellees submitted evidence to show that the payment of postage would be financially burdensome to them because of their minimal resources (A. 36-37, 55-56, 100-101, 115). Appellees' witnesses also testified that mail delivery service sometimes is too slow to satisfy the civic associations' need to communicate quickly with their constituents (A. 36-37, 84-86, 95-97).

The district court balanced the benefits derived by the Postal Service from Section 1725 against the harm suffered by appellees as the result of the statute and concluded that "the cost to free expression of imposing this burden on [appellees] outweighs the showing made by the Postal Service of its need to enforce the statute to promote effective delivery and

protection of the mails" (J.S. App. 9a).[7] The court therefore enjoined the Postal Service from enforcing Section 1725 against appellees or the Council's constituent civic associations (J.S. App. 20a-21a).

SUMMARY OF ARGUMENT

18 U.S.C. 1725 is a reasonable, content-neutral statute enacted to protect mail revenues and to promote efficiency and security in the delivery of the mails. The prohibition against placement of unstamped mailable matter in letter boxes has no more than a negligible effect on the exercise of First Amendment rights, and any such effect is a permissible byproduct of a narrowly drawn restriction on the place and manner in which communication may occur. The statute therefore does not violate appellees' constitutionally protected freedom of expression.

Section 1725, which was passed in 1934, is a presumptively valid Act of Congress, plainly authorized by the powers delegated in Article I, Section 8 of the Constitution to "establish Post Offices and post Roads" and to make all laws "necessary and proper" for that purpose. The statute bans the deposit of *all* unstamped mailable matter in letter boxes and thus does not depend on the content of the materials that a person may wish to distribute without paying postage. Section 1725 therefore does not implicate the

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[7] The district court refused to consider the statute's benefits to the privacy interests of mail patrons on the grounds that the Postal Service could not raise such interests and that, in any event, homeowners could protect those interests by posting "no trespassing" signs or enforcing local trespass laws (J.S. App. 11a n.8).

central concern of the First Amendment, which is the restriction of expression because of the message it conveys.

To the extent that Section 1725 regulates speech at all, it limits only the place and manner of expression. But this Court has repeatedly upheld such restrictions if they "serve a significant governmental interest and leave ample alternative channels for communication." *Consolidated Edison Co.* v. *Public Service Commission*, No. 79-134 (June 20, 1980), slip op. 4-5. Here, Section 1725 leaves open a number of effective alternative methods by which appellees may circulate notices and handbills to their constituents. Appellees may use the mails, upon payment of the required postage; they may distribute their announcements to private homes by leaving notices under the door or on the doorknob or by tacking them to a post; and they may communicate through person-to-person distributions or by telephone. If appellees have special concerns that make them reluctant to use these alternative channels or if their peculiar needs make alternative methods of communication marginally less effective, that is not sufficient to render Section 1725 invalid under the First Amendment.

A variety of significant governmental interests are served by Section 1725. The statute prevents the dilution of mail revenues and protects the security of the mails. The statute also promotes the efficient delivery of the mails by avoiding overcrowding and eliminating the need for postal carriers to perform extensive sorting of mailable matter found in letter boxes. In addition, Section 1725 helps ensure the privacy of postal patrons by limiting legitimate access to the contents of mail receptacles.

Letter boxes are part of the postal system, and they would not exist were it not for the Postal Service. The modest fee of ordinary postage to defray the expenses of the postal system is not an unreasonable price to pay for the privilege of using part of that system. Section 1725 does not violate the First Amendment by requiring appellees either to pay this postage or to deliver their messages without using letter boxes.

ARGUMENT

18 U.S.C. 1725 DOES NOT VIOLATE THE FIRST AMENDMENT BECAUSE IT IS A REASONABLE, CONTENT-NEUTRAL REGULATION OF POSTAL AFFAIRS THAT IMPOSES ONLY A MINIMAL RESTRICTION ON THE PLACE AND MANNER OF COMMUNICATION

The Constitution empowers Congress to "establish Post Offices and post Roads" and to "make all Laws which shall be necessary and proper" for executing that task. Congress has exercised these powers to establish a postal system governed by detailed statutes and regulations. See 39 U.S.C. 401 *et seq.* and the Domestic Mail Manual. Neither the district court nor appellees have suggested that 18 U.S.C. 1725 exceeds Congress' power under the Post Office and Necessary and Proper Clauses in Article I, Section 8. Letter boxes are an essential part of the mail delivery system and are therefore subject to reasonable regulations. We begin, then, with a presumptively valid federal statute, unchallenged for more than 40 years, and clearly within the powers delegated to the Legislative Branch by the Constitution.

The next important characteristic of Section 1725 is that it does not in any way restrict appellees' right

or opportunity to use the mails. Appellees may mail their civic notices in the ordinary way, and the Postal Service will treat them identically with all other mail. To be sure, if appellees choose to use the mails, they will be required to pay postage, but appellees do not purport to challenge the constitutionality of the imposition of a fee for the services provided by the postal system. Because of the nature of the Postal Service's business, virtually all aspects of its operations have some incidental impact on the ability of people to communicate effectively. Yet appellees do not and could not seriously contend that every postal regulation that imposes some requirement on persons wishing to use the mails is, for that reason, invalid. As this Court has written, "[t]he guarantees of the First Amendment have never meant 'that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.'" *Greer* v. *Spock*, 424 U.S. 828, 836 (1976), quoting *Adderley* v. *Florida*, 385 U.S. 39, 48 (1966).

The First Amendment does not obligate the Postal Service to make the mail system available to any user on the most convenient possible terms. More generally, the Amendment does not impose on the government any affirmative obligation to fund or otherwise facilitate constitutionally protected expressive activity. Indeed, this Court has frequently sustained governmental regulations that arguably impose some restriction on the ease with which communication can occur. See, *e.g.*, *Cox* v. *New Hampshire*, 312 U.S. 569 (1941) (rejecting First Amendment challenge to license and fee requirement for parades and processions in the public streets); *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 130-

131 (1977) (prison regulation prohibiting deliveries of bulk mail to prisoners' union and thus making bulk mailing rates unavailable to parties wishing to communicate with union members "does not fundamentally implicate *free speech* values"); *Kovacs* v. *Cooper*, 336 U.S. 77, 88-89 (1949) (plurality opinion) ("That more people may be more easily and cheaply reached by sound trucks, perhaps borrowed without cost from some zealous supporter, is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open").[8] Cf. *Harris* v. *McRae*, No. 79-1268 (June 30, 1980), slip op. 18 (no constitutional obligation to provide financial resources needed to exercise protected rights); *Maher* v. *Roe*, 432 U.S. 464, 474-475 n.8 (1977) (same). Although appellees' do not complain in so many words that Section 1725 impermissibly burdens their use of the mails, their real grievance is that the statute requires payment of a fee—*i.e.*, postage—before part of the postal system may be used for the delivery of their messages. But this is precisely the kind of governmental "inhibition" on free communication that the Court has repeatedly upheld under the First Amendment.

The third factor critical to the disposition of this case is the undisputed and indisputable content-neutrality of Section 1725. The statute's prohibition on

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[8] Indeed, in *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974), this Court upheld a city's complete refusal to permit the sale of space for political advertising on the local public rapid transit system, even though the city allowed advertising in that forum for commercial enterprises, religious organizations, and civic and public-service groups.

the placement of unstamped mailable matter in a letter box applies without regard to the nature of the items involved.[9] In no sense, therefore, does Section 1725 entail government interference with the

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[9] A Postal Service regulation appears to create an exception to this general proposition. DMM 156.58 provides that "publishers of newspapers regularly mailed as second-class mail may, *on Sundays and national holidays only*, place copies of the Sunday or holiday issues in the rural and highway contract route boxes of subscribers, with the understanding that copies will be removed from the boxes before the next day on which mail deliveries are scheduled" (emphasis in original). The language of Section 1725 does not explicitly authorize the Postal Service to make exceptions to the general prohibition against the deposit of unstamped mailable matter in letter boxes. In any event, however, the validity of DMM 156.58 is not at issue here. Appellees' challenge to Section 1725 does not depend on the existence of DMM 156.58, and appellees have not disputed the characterization of Section 1725 as a content-neutral statute. Moreover, the exception created by DMM 156.58 is an extremely narrow one, designed in fact to advance the purpose of Section 1725 by protecting mail revenues. DMM 156.58 applies only to newspapers that are regularly mailed as second-class mail and that therefore contribute to the finances of the postal system; it affects only days on which mail is not delivered and only materials that, by their very nature, could not be ready for distribution at some earlier time; because timeliness is a critical component of newspapers' appeal and utility, it is essential that they be delivered on days when mail service is unavailable, and there will ordinarily be a factual justification for the understanding, required by DMM 156.58, that they will be removed from letter boxes before the next scheduled mail delivery. By granting this limited dispensation to newspapers regularly distributed through the mails, DMM 156.58 encourages publishers to use the mails to distribute their papers. The regulation thus serves to increase mail revenues and thereby furthers the primary purpose of Section 1725.

content of expression, which, as this Court has often emphasized, is the central concern of the First Amendment. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972).

Fourth, Section 1725 unquestionably leaves other methods of communication open to appellees. Even if appellees do not wish to use the mails, they may distribute their civic announcements to private homes in the area by placing the notices under the door or doormat, by hanging them on a doorknob, or by tacking or taping them to a doorpost or to the post on which the letter box rests. Appellees may circulate their handbills through person-to-person distribution in public areas in the community, and they may also communicate by telephone or through advertisements in local newspapers. Appellees may put their flyers in boxes other than letter boxes that constituents have placed outside their houses (*e.g.*, boxes intended for daily newspaper delivery), and they may request local homeowners to install such an additional box, or to permit the civic associations to install one, where one is not already available. If a house has a door slot rather than a letter box, appellees may insert their notices directly through the slot (see note 2, *supra*).[10]

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[10] This case therefore is not like *Schneider* v. *State*, 308 U.S. 147 (1939), and *Martin* v. *City of Struthers*, 319 U.S. 141 (1943), in which local governments completely prohibited certain forms of communication. *Schneider* involved ordinances banning the distribution of handbills or circulars on all public streets. *Martin* involved an ordinance prohibiting distributors of handbills or circulars from knocking on doors, ringing doorbells, or otherwise summoning the occupants of a house to the door for the purpose of delivering the ma-

The evidence presented in the district court does not contradict anything in the preceding paragraph. The survey introduced by the Postal Service concerning the comparative effectiveness of different distribution methods showed that between 70% and 75% of the materials placed under doors or doormats or hung from doorknobs are found by the homeowner, whereas approximately 82% of the items placed in letter boxes are found.[11] This marginal difference can-

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terials to them personally. The ordinance effectively precluded the systematic face-to-face distribution of literature to householders in a particular neighborhood. No such general ban on a method of communication is at stake here.

Moreover, the government in this case has acted, not in the exercise of any general "police power" to regulate private conduct for the benefit of society as a whole, but rather as the proprietor of a particular economic enterprise, the postal system. The regulation at issue concerns only a part of that enterprise (*i.e.*, letter boxes), and it permits unlimited use of the enterprise's facilities upon payment of an appropriate fee. The "police power" ordinances at issue in *Schneider* and *Martin* did not merely require payment of a reasonable licensing fee as a condition for distributing handbills in a certain place or manner; instead, they flatly prohibited certain methods of distribution.

Finally, *Schneider* and *Lovell* v. *City of Griffin*, 303 U.S. 444 (1938), are readily distinguishable from the present case because privately owned letter boxes intended for use by the Postal Service in the delivery of mail are not public forums in the same way that a community's streets and parks are. It cannot be said of letter boxes, as Mr. Justice Roberts wrote of streets and parks, that "they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague* v. *CIO*, 307 U.S. 496, 515 (1939) (concurring opinion).

[11] The figures in the text are derived from Govt. Exh. D-1 (A. 165). By simple division, the statistics reproduced on page 8, *supra*, yield the results reported above.

not be of constitutional significance. The district court's purported "findings of fact" regarding the effect of Section 1725 on appellees' ability to communicate (J.S. App. 3a-6a) establish at most that the prohibition against the deposit of unstamped mailable matter in letter boxes makes it slightly more difficult for appellees to reach their constituents. In support of this conclusion, the district court cited such factors as the expense of mailing, the administrative burden of maintaining current mailing lists, the need for speed in giving notice, the vagaries of weather, and the presence of weatherstripping under the doors of many suburban houses. The constitutionality of an Act of Congress should not turn on such comparatively trivial considerations—some of which may even be within appellees' power to affect. The dispositive point is that alternative means of communication *are* open to appellees, even if they may be incrementally less effective.[12]

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[12] Although appellees' witnesses purported to identify several ways in which Section 1725 interferes with appellees' ability to communicate with their constituents, and although the district court relied on some of this testimony in its opinion (J.S. App. 5a-6a), the fact is that several of appellees' grievances concern not their *ability* to communicate effectively but rather their *preference* concerning the precise means to be employed.

For example, one of appellees' witnesses was asked by the district court whether civic association notices could simply be taped to the front doors of houses in the neighborhood involved. The witness responded (A. 43): "Your Honor, I think in many areas it would be alienating and offensive. I have never seen it done. If I used Scotch tape in my neighborhood, I predict there might be great resentment, and the meeting might be over before you got through." Another witness was asked whether she had ever made any effort to affix civic notices to doors of houses by using Scotch

The very existence of letter boxes, after all, depends on the Postal Service. If Congress had never created the postal system, or if the Postal Service did not require its customers to provide mail receptacles, or if the Postal Service determined that all mail receptacles should be locked and that only the mail carrier and the postal customer should have keys (as is in fact the case in many apartment buildings), appellees would be affected in substantially the same way as they are under Section 1725. Yet appellees

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tape or masking tape. She answered (A. 76): "Oh, I wouldn't think of that. The Scotch tape mars the paint. * * * [I]t would look ugly on the home, and it would take longer to do that." In addition, several witnesses testified that appellee civic associations do not wish to deliver their notices to the doorsteps of houses in the community because, if such materials are not promptly picked up by the residents, their presence outside the door tends to be an invitation to burglars (A. 43, 51-52, 75).

Such considerations, although obviously of some practical importance, are not related to the question whether Section 1725 unconstitutionally impairs appellees' freedom of expression. Appellees *are* able to communicate with their constituents, even though they may not distribute their circulars exactly as they choose.

Furthermore, appellees' financial health and their special need for speed in the delivery of their messages are not matters for which Congress may appropriately be held responsible under the First Amendment. The constitutionality of a federal statute as applied to a particular group cannot depend on peculiar characteristics that, to some extent at least, may be within the group's own control or on peculiar problems that the group faces in attempting to achieve its objectives. If such factors were in fact controlling, the validity of numerous federal laws and regulations, including virtually every provision in the Domestic Mail Manual, could only be established through a long series of ad hoc adjudications in federal courts throughout the country.

can hardly contend that the First Amendment compels Congress to maintain a postal system or that the Postal Service is constitutionally obligated to require its customers to provide unlocked letter boxes. Reduced to its essentials, however, appellees' argument in this case is not very different from such a contention. They assert, in effect, that because civic associations in the Town of Greenburgh find it most convenient to distribute notices and other materials by depositing them in letter boxes without paying postage, that option must remain available, despite the contrary determination of Congress, unless the Postal Service can demonstrate some compelling governmental interest that outweighs the civic associations' need for optimum communication with their constituents.

Appellees misconceive the applicable law under the First Amendment. As this Court reaffirmed last Term in *Consolidated Edison Co. v. Public Service Commission*, No. 79-134 (June 20, 1980), slip op. 5, "[a] restriction that regulates only the time, place or manner of speech may be imposed so long as it is reasonable." See also *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85, 93 (1977); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976); *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 209 (1975); *Grayned* v. *City of Rockford*, 408 U.S. 104, 115-116 (1972); *Cox* v. *New Hampshire*, *supra*, 312 U.S. at 575-576. Such "time, place, or manner" regulations are permissible if they "serve a significant governmental interest and leave ample alternative channels for communication." *Consolidated Edison Co. v. Public Service Commission*, *supra*, slip op. 4-5. Because appellee civic associations can

unquestionably communicate with their members without putting unstamped mailable matter in letter boxes, the only remaining question is whether Section 1725 serves a "significant governmental interest."

That brings us to the fifth point that supports the constitutionality of the challenged statute. Section 1725 is a reasonable means of pursuing several legitimate governmental ends that Congress properly may seek to further through postal legislation. As the legislative history of the statute shows (see note 3, *supra*; J.S. App. 25a), Section 1725 is designed to prevent the dilution of mail revenues through the private delivery of unstamped mailable matter. This alone is a sufficiently significant governmental interest to justify the statute. See, *e.g.*, *National Association of Letter Carriers* v. *Independent Postal System of America, Inc.*, 470 F.2d 265 (10th Cir. 1972); *United States Postal Service* v. *Brennan*, 574 F.2d 712 (2d Cir. 1978), cert. denied, 439 U.S. 1115 (1979); *Associated Third Class Mail Users* v. *United States Postal Service*, 600 F.2d 824 (D.C. Cir.), cert. denied, 444 U.S. 837 (1979).[18]

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[18] The district court has enjoined enforcement of Section 1725 only with respect to appellee civic associations (and any civic association in the Town of Greenburgh that subsequently becomes a member in good standing of appellee Council) (J.S. App. 20a-21a & n.*). Although appellees and the district court have not expressed any objection to enforcement of the statute as applied to commercial enterprises, affirmance of the district court's judgment will almost certainly lead to further attacks on Section 1725 by business concerns that wish to circumvent the postal monopoly. In light of this Court's recent decisions regarding the protected status of commercial speech (see, *e.g.*, *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, *supra*; *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765

In addition, Section 1725 plays a role in protecting the security of the mails from theft and tampering and in promoting the efficient delivery of the mails. Congress could properly be concerned with preventing theft, not only of items delivered by mail carriers to letter boxes, but also of money and mail placed in letter boxes by postal customers for collection by the carrier.[14] Moreover, by prohibiting the deposit of unstamped mailable matter in letter boxes, Section 1725 helps to avoid overcrowding, and it also eases the burden on mail carriers, who must separate unstamped materials deposited in letter boxes from items of mail left in letter boxes by postal patrons for collection. By banning *all* unstamped mailable matter from letter boxes, Section 1725 avoids the need for mail carriers to classify such materials into lawful and unlawful categories.[15]

(1978); *Consolidated Edison Co.* v. *Public Service Commission, supra*), the outcome of such challenges would be quite problematical if the decision now under review were sustained.

[14] DMM 156.4 expressly authorizes rural postal customers to leave mail and money for postage in letter boxes for collection by the carrier. Although the DMM does not contain a similar provision applicable to postal patrons in urban areas, the Postal Service's Methods Handbook governing "City Delivery Carriers Duties and Responsibilities" instructs carriers on urban routes to "accept letters for mailing from customers" and to "[c]ollect prepaid letters placed next to, in, or on private mail receptacles when delivery is being made at that point." Handbook 122.12, 132.12. Under 39 C.F.R. 211.2(a)(3), Postal Service handbooks are included within the regulations of the Postal Service.

[15] If the district court's judgment is affirmed, it is reasonable to expect that more unstamped mailable matter will be placed in letter boxes. A carrier finding mailable materials in a letter box will presumably be required to sort them into three groups: (i) unstamped civic association items, which

Finally, Section 1725 provides a significant protection for the privacy interests of postal customers. The statute permits patrons to send and receive mail without fear that the identities of their correspondents will become known to community activists or others who seek to use letter boxes for their own purposes.[16] Cf. *Ex parte Jackson*, 96 U.S. 727, 733 (1877) (emphasizing the security of the mails from inspection).

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must be left undisturbed; (ii) unstamped commercial materials, which must be returned to the local post office, under DMM 146.12, 146.22; and (iii) postage-paid items left by the postal patron for collection by the carrier or mail placed in the box by the carrier on an earlier occasion but not yet collected by the patron. Although the district court refused to accept the testimony of a Postal Service witness that the additional administrative burden can be expected to cost approximately $160,000 daily if imposed nationwide (A. 144; J.S. App. 10a-11a), there is little question that application of the district court's ruling throughout the country would entail substantial expense, even if the precise amount is indeterminate. In addition, it will be impossible for a mail carrier to determine, simply by examining unstamped civic association materials, whether those materials have been properly delivered by association members themselves or whether they have been improperly delivered by a private competitor of the Postal Service, in violation of the Private Express Statutes, 39 U.S.C. 601-606 and 18 U.S.C. 1693-1697.

[16] The district court erred in concluding that the Postal Service may not raise postal patrons' privacy interests as a legitimate legislative concern supporting the enactment of Section 1725. Such notions of standing have no place in assessing the constitutionality of a federal statute. Congress has undoubted authority to enact legislation protecting the privacy of users of the mails. *Rowan* v. *United States Post Office Department*, 397 U.S. 728 (1970). See *Carey* v. *Brown*, No. 79-703 (June 20, 1980), slip op. 15; cf. *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 302-304 (1974).

Notwithstanding the legitimate governmental purposes served by Section 1725 and the alternative means of communication open to appellees, the district court invalidated the federal statute. The court assumed improperly that, when the First Amendment is involved, the judicial task on review of an Act of Congress is to weigh the effects of the statute on free expression against the governmental interests advanced and to sustain the law only if the latter outweigh the former. This may be the appropriate approach when Congress attempts in some way to regulate the content of speech, but it has no application to a content-neutral statute that is "narrowly tailored to further [the government's] legitimate interest" and that affects only the place and manner in which communication may occur. *Grayned* v. *City of Rockford*, *supra*, 408 U.S. at 116-117. When other effective methods of expression are available and when the governmental interests at stake are legitimate and significant, a reviewing court's task is at an end. The court may not conduct its own balancing of the competing concerns and decide how it would accommodate those interests if it were in the position of Congress. Even where First Amendment values are implicated, this Court has acknowledged that the Judicial Branch "must afford great weight to the decisions of Congress * * *." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 102 (1973), quoted in *Fullilove* v. *Klutznick*, No. 78-1007 (July 2, 1980) (Burger, C.J.), slip op. 20-21. The district court in the present case failed to heed that admonition.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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APPENDIX

For Release in MORNING PAPERS of
WEDNESDAY, JANUARY 3, 1934

INFORMATION SERVICE
POST OFFICE DEPARTMENT

In response to numerous complaints which have been received at the Post Office Department against the use of letter boxes as receptacles for such mailable matter as statements of account, sales bills, advertising circulars and the like, Postmaster General James A. Farley, last night signed an order amending the Postal Regulations, designed to alleviate this ever-growing annoyance to patrons of the Postal Service.

The amended postal regulation which instructs the carrier to remove from letter boxes or other mail receptacles mailable matter on which no postage has been paid and carry such mailable matter to the post office to be held for postage and treated as prescribed by section 723 of the Postal Laws and Regulations, now reads as follows:

> "Private mail receptacles shall be used to facilitate the delivery of mail. When designated by the owner or user thereof for the purpose of receiving mail, all rules and regulations affecting the use of such receptacles issued by the Postmaster General shall be effective and apply to such receptacles.
>
> "Every such private mail box or other receptacle intended for use for the receipt or delivery of mail matter by any city or village letter carrier shall be used exclusively for the reception of matter regularly in the mails, and any mail-

able matter, such as statements of account, circulars, sales bills, or other like matter, deposited therein shall be treated in accordance with the rules governing the mails, including the proper addressing and the payment of postage at the regular rate.

"When a carrier finds deposited in such a mail box or other mail receptacle mailable matter on which no postage has been paid, addressed to or intended for the person in whose box it is deposited, he shall take such matter to the post office to be held for postage and treated as prescribed by section 723."

Patrons of the Postal Service throughout the country have deluged the Department with complaints that their private letter boxes have been cluttered with all kinds of advertising matter, circulars, statements, bills, political handouts, tickets of all kinds, bargain sale announcements, etc.

In many instances letter carriers have found it difficult to deposit mail in the overcrowded letter boxes, and in the larger cities that has worked considerable hardship on the carrier with a resultant lost of time.

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